SUPREME COURT
FILED

JUL 25 2019

Jorge Navarrete Clerk

Deputy

S253295

IN THE

SUPREME COURT OF CALIFORNIA

FRANK C. HART and CYNTHIA HART,

Plaintiffs and Petitioners,

v.

KEENAN PROPERTIES, INC.,

Defendant and Respondent.

AFTER A DECISION BY THE FIRST DISTRICT COURT OF APPEAL, DIVISION FIVE, CASE NO. A152692, FOLLOWING APPEAL FROM A JUDGMENT OF THE ALAMEDA COUNTY SUPERIOR COURT, CASE NO. RG16838191.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

W. JOSEPH GUNTER (SBN 170810)
jgunter@cmbg3.com
GILLIAM F. STEWART (SBN 260070)
gstewart@cmbg3.com

CMBG3 LAW, LLC
100 Spectrum Center Drive, Suite 820
Irvine, CA 92618
Telephone: (949) 467-9500
Facsimile: (949) 377-3355

Attorneys for Respondent and Defendant
KEENAN PROPERTIES, INC.

TABLE OF CONTENTS

	Page
INTRODUCTION	9
FACTUAL AND PROCEDURAL HISTORY	13
I. The testimony of Glamuzina was the only evidence that Keenan supplied pipe to Hart's work.	13
II. The Appellate Court's Opinion addresses every material fact.	14
III. Glamuzina's testimony disproves Plaintiffs' claims of corroborating facts.	18
A. The geographic location of a Keenan branch had no bearing on Glamuzina's testimony..........................	18
B. Glamuzina did not describe a Keenan logo.............	20
C. Plaintiff counsel intentionally prohibited the showing of exemplar invoices to their client, John Glamuzina.	22
IV. Christeve had a standing relationship with Johns-Manville, not Keenan.	24
V. The Thibodo will-call invoice was a ruse to confuse the jury that Plaintiffs are furthering on appeal........................	27
VI. Plaintiffs' assertion that Keenan had relevant documents that were "destroyed" is pure speculation without evidentiary support.	29
VII. In contrast to Glamuzina's unsupported hearsay, authenticated Johns-Manville documents corroborated by witness testimony were excluded as untrustworthy.	30
A. The Johns-Manville documents are authentic and reliable.	30
B. The Johns-Manville documents were directly corroborated by testimony from Hart and Mitrovich but excluded by the Trial Court...............................	32

TABLE OF CONTENTS

	Page
1. The Trial Court strictly interpreted hearsay law to exclude documents exculpating Keenan.	35
2. The Trial Court denied Keenan's renewed motion to admit Invoice 62094A after misconduct by plaintiff counsel.	37
ARGUMENT	38
I. Standard of review: abuse of discretion.	38
II. Glamuzina's testimony offered for the truth of the matter has no independent relevance as merely evidence of identification.	39
A. The *only* evidence offered by Plaintiffs to prove that Keenan was a supplier to Hart's work was inadmissible hearsay.	39
B. Plaintiffs' argument that the "'K' logo and 'Keenan' name were non-hearsay circumstantial evidence of identity" is contradicted by the record.	41
C. Glamuzina's testimony regarding Keenan invoices cannot be distinguished from hearsay based on the contents of a writing.	42
D. The holding of *Osborne v. Todd Farm Service* required the Trial Court to exclude Glamuzina's hearsay testimony based on the contents of unauthenticated invoices.	47
E. The trial court misinterpreted *Osborne* when it denied Keenan's motion to exclude hearsay testimony.	50

TABLE OF CONTENTS

Page

III. The invoices seen only by Glamuzina must be authenticated before there can be a finding of a party admission under Section 1220, and there is no proof that Keenan issued the invoices other than Glamuzina's circular hearsay testimony. 51

IV. Glamuzina's ambiguous testimony combined with speculation by the Trial Court cannot authenticate "invoices" specifically attributed to Keenan for the purpose of establishing Keenan's liability. 55

A. Purpose: To establish Keenan as the supplier liable for Mr. Hart's exposure to asbestos-cement pipe..... 57

B. Specific nature of the writing: Nonexistent invoices last seen 40 years ago, purportedly for the sale of asbestos-cement pipe that exposed Plaintiff to asbestos.......... 58

1. Glamuzina's testimony is not sufficient authentication when there is no other evidence that the documents existed.......... 59

2. Glamuzina never testified that the invoices were consistent with an exemplar of a Keenan invoice or logo. 61

3. The Trial Court's finding that Keenan's records were destroyed by its successor is irrelevant to the determination of authenticity.......... 63

C. The Trial Court disregarded California case law and relevant facts in ruling that Glamuzina's testimony was sufficient evidence of authentication. 64

D. None of the cases cited by Plaintiffs in support of a finding of authentication apply to the facts of this case. 68

TABLE OF CONTENTS

Page

V. Finding that Glamuzina's circular testimony authenticates nonexistent documents will allow the admission of third-party hearsay testimony as a party admission in future cases without limitation. 72

CONCLUSION 74

CERTIFICATE OF WORD COUNT 77

TABLE OF AUTHORITIES

Page(s)

Cases

Continental Baking Co. v. Katz
(1968) 68 Cal.2d 512 .... 56, 74

DiCola v. White Brothers Performance Products, Inc.
(2008) 158 Cal.App.4th 666 40

Healy v. Buchanan
(1868) 34 Cal. 567 73

Jones v. Dumrichob
(1998) 63 Cal.App.4th 1258, 1267 40

Lewis v. W. Truck Line
(1941) 44 Cal.App.2d 455, 465 52

Los Angeles Cty. v. Sec. First Nat. Bank of Los Angeles
(1948) 84 Cal. App. 2d 575 73

Osborne v. Todd Farm Service
(2016) 247 Cal.App.4th 43 .... 38, 47-51, 56, 65-66, 74

Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.
(1968) 69 Cal.2d 33 .... 40-41, 43, 47, 74

Pansini v. Weber
(1942) 53 Cal.App.2d 1 .... 51, 55

People ex Rel. Harris v. Sarpas
(2014) 225 Cal.App.4th 1539 70

People v. Chapple
(2006) 138 Cal.App.4th 540 44

People v. Freeman
(1971) 20 Cal.App.3d 488 44-46

People v. Gibson
(2001) 90 Cal.App.4th 371 .... 60, 69

People v. Goldsmith
(2014) 59 Cal.4th 256 .... 12, 56-57, 74

TABLE OF AUTHORITIES

Page(s)

People v. Morrison
(2004) 34 Cal. 4th 698 53

People v. Skiles
(2011) 51 Cal. 4th 1178 69

People v. Smith
(2009) 179 Cal.App.4th 986 70

People v. Williams
(1992) 3 Cal.App.4th 1535 44-45

Prato-Morrison v. Doe
(2002) 103 Cal. App. 4th 222 72

YDM Management Co., Inc. v. Sharp Community Medical Group, Inc.
(2017) 16 Cal.App.5th 613 54

Young v. Sorenson
(1975) 47 Cal.App.3d 911 .... 60-61, 69

Statutes

Code Civ. Proc. § 340.2 73

Evid. Code § 403 56

Evid. Code § 1200 .... 40, 49

Evid. Code § 1220 .... 51, 54-55

Evid. Code § 1400 .... 55-56, 64

Evid. Code § 1401 .... 49, 55-56, 65

Evid. Code § 1414 66

Evid. Code § 1520 72

Evid. Code § 1521 .... 55, 72, 74

Evid. Code § 1523 .... 64, 72

Secondary Sources

TABLE OF AUTHORITIES

Page(s)

California Practice Guide Civil Trials & Evidence, Ch. 8D-D. Hearsay Exceptions 51

1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 31 47

INTRODUCTION

This personal injury case hinges on one question: Who supplied the asbestos-cement pipe to plaintiff Frank Hart's jobsite in McKinleyville, California, 40 years ago?

The answer is Johns-Manville, a bankrupt entity. Authenticated documents from the repository of Johns-Manville show sales of thousands of feet of asbestos-containing "transite" pipe from Johns-Manville directly to Plaintiff's employer, Christeve. Those authenticated documents also show that the J-M pipe was delivered by Johns-Manville to the McKinleyville job during the *exact six-month period* Hart was personally working at the McKinleyville site. The Trial Court excluded these authenticated documents as hearsay without exception.

Instead, the Trial Court admitted the testimony of a coworker, John Glamuzina, who testified that 40-plus years ago he read nonexistent invoices regarding shipments of J-M transite pipe to the McKinleyville job that asserted that Keenan was the supplier. Though not a party, Glamuzina was represented by plaintiff counsel at deposition and at trial. Glamuzina's testimony is the *only* evidence

establishing any connection between plaintiff Frank Hart and a product supplied by Keenan.

As framed by this Court, this case presents the following issues:

(1) Was a witness's testimony about his recollection of seeing invoices regarding the supply of products containing asbestos to Plaintiff's worksite inadmissible hearsay?

Yes. When the witness's testimony regarding the supplier of products was based *solely* on the content of nonexistent invoices and the testimony had no purpose or context other than to prove the truth of the matter asserted – that the defendant supplied the asbestos-containing products – that testimony is inadmissible hearsay.

(2) Could secondary evidence of the invoices be authenticated by the witness's statements and other circumstantial evidence?

No, not based on the facts of this case when the invoices are nonexistent and none of the posited

circumstantial evidence corresponds to the witness's actual testimony.

The Opinion of the Court of Appeal addresses every fact material to the determination of whether Glamuzina's testimony was inadmissible hearsay. Plaintiffs argue that there is corroborating evidence, but every such piece of "evidence" cited by Plaintiffs is contradicted by Glamuzina's exact words, or based on nothing more than speculation. In speculative contextomy, Plaintiffs cite Glamuzina's single, ambiguous reference to "their K and stuff" as corroborating a logo depicted on Keenan letterhead. However, contrary to Plaintiffs' assertions at trial and on appeal, Glamuzina never mentions seeing a logo on these alleged writings. There is no evidence corroborating Glamuzina's testimony regarding Keenan as a supplier to McKinleyville. Plaintiffs had the opportunity to show Glamuzina exemplar invoices and logos at trial, but intentionally refused to do so. None of the issues now characterized by Plaintiffs as key facts have any relevance to Glamuzina's testimony.

The Court of Appeal found that Glamuzina's testimony was hearsay without dissent on that issue. Plaintiffs now attempt to

characterize Glamuzina's testimony as merely identification. Argument that Glamuzina's testimony is merely identification, and therefore not hearsay, is contrary to the facts of each case admitting testimony on that basis. Glamuzina's testimony was offered for the truth of the matter and has no independent relevance as evidence of identification.

The invoices seen only by Glamuzina must be authenticated before there can be a finding of a party admission. Following this Court's rationale in *Goldsmith*, the *purpose* of the writings (to prove that Keenan supplied asbestos products that exposed Hart), and the *nature* of the writings (nonexistent) require higher scrutiny for purposes of authentication. There are no other indicia of reliability other than Glamuzina's scant description of the documents. Accordingly, Glamuzina's testimony cannot serve to authenticate documents that only he has seen, and no exception to the hearsay rule applies.

Glamuzina's testimony is circular – it serves to create its own hearsay exception through which it would be admissible. A finding that Glamuzina's testimony about nonexistent documents authenticates those same nonexistent documents will allow the admission of third-

party hearsay testimony as a "party admission" in future cases without limitation. The Court of Appeal correctly found that Glamuzina's testimony was hearsay, and thus, inadmissible.

FACTUAL AND PROCEDURAL HISTORY

I. The testimony of Glamuzina was the *only* evidence that Keenan supplied to pipe to Hart's work.

At trial, plaintiff Frank Hart testified that he was a construction pipe layer for most of his working career. (12 RT 3320:2-17.) Keenan was a wholesale distributor of industrial piping supplies until it sold that business and the name "Keenan Supply" to Hajoca in 1983. (8 RT 2197:11-23, 2220:16-2221:24.) While Keenan had sold asbestos-cement pipe as part of its business, Keenan primarily sold various other industrial supplies, such as steel pipe and fittings. (8 RT 2200:9-2201:22, 13 RT 3681:17-3683:8.)

The only allegations against Keenan relate to Hart's work in McKinleyville, California. Hart worked for Christeve in McKinleyville from "September 1976 to roughly March 1977." (12 RT 3307:4-7, 3324:13-3325:8.) While at McKinleyville, Hart helped install new sewer lines using Johns-Manville manufactured asbestos-cement pipe. (12 RT 3328:22-3329:13.) The source of the asbestos-cement pipe is

the critical issue bearing on Keenan's liability in this case. Johns-Manville historically sold asbestos-cement pipe directly to the end users like Christeve, and would not go through distributors like Keenan. (8 RT 2228:1-17.)

Hart worked for several Christeve supervisors at McKinleyville, including John Glamuzina, who was Hart's foreman for two to three months from January 1977 until Hart left the McKinleyville job in "roughly" March 1977. (12 RT 3331:21-3332:25.) Hart himself did not recall who supplied the asbestos-cement pipe. (12 RT 3344:20-3345:1.) The only evidence linking Keenan to *any* of Hart's work came from Glamuzina's videotaped deposition testimony.

II. The Appellate Court's Opinion addresses every material fact.

The Opinion of the Court of Appeal, First Appellate District, states, "To establish Keenan supplied asbestos-cement pipe to the McKinleyville jobsite, the Harts relied on Glamuzina's testimony regarding signing invoices when truckers delivered loads of the pipe. Glamuzina testified as follows:

> Q. And how did you know Keenan was the supplier of the asbestos cement pipe that your crew was laying in the City of McKinleyville?

A. Well, there would be different invoices to sign when the truckers would come up with a load.

Q. Okay. Did you personally sign any of these invoices?

A. There was a few. I can't remember how many.

[¶] ... [¶]

Q. The invoices that you mentioned, what exactly did they have? What information did they have on them?

A. It would just -- the trucker would have an invoice of his load, what he had on his load, and I'd just double-check it, see -- usually it tells you where it came from. That's all.

Q. And what do you mean where it came from?

A. What plant or -- stuff like that, I didn't -- all I would do is count the load and see what we had and sign it, and it would be off.

Q. And what sort of materials was Keenan [s]upplying to the City of McKinleyville job?

A. The transite pipe for the sewer.

Q. This is the Johns-Manville transite pipe?

A. Yeah. Yes.

Q. Did you see the name Keenan on the invoices that you personally signed?

A. I recall a few times, yes."

(Opinion p. 5-6 [12 RT 3400:19-3401:1; 3403:23-3404:15].)

The appellate court went on to note that, "Later, when examined by another attorney, Glamuzina was asked:

Q. You mentioned that some of the materials were supplied by Keenan, and you mentioned that you saw Keenan on some of the invoices; is that right?

A. I recollect some of it, yes.

Q. How was Keenan written on the invoices?

A. I thought it was, if I can remember right, I think it was like a print, I'm not positive, like a black print or -- I can't -- to be honest, I can't recall exactly.

Q. Do you know if it just said Keenan or if there were any other words?

A. I couldn't answer that.

Q. The invoices that you would see with Keenan written on there, what types of materials were being supplied by Keenan?

A. I would just check the load for my eight-inch pipe, shorts or whatever came on the pipe, that's all I would check on that.

Q. So you were checking the invoices to make sure that the amount of pipe or whatever materials were being supplied matched what was on the truck?

A. Yeah, whenever I was there, when they delivered when I was there, I was always checking.

Q. And did you ever have to sign any of the invoices indicating that you had done your check and the invoices matched what was being delivered?

A. We did sign a trucker's invoice, yes.

Q. And then what would you do with the invoice?

A. I'd take a copy and give it to the office.

Q. Would the trucker keep a copy of the invoice?

A. He would keep his, that's correct.

Q. Were those like carbon copy invoices?

A. That's correct.

Q. I'm sorry. And who would you give your copy to?

A. I would turn everything into the office at the end of the day.

[¶] ... [¶]

Q. Now, when you were going through these invoices, did you see any other names of any other suppliers aside from Keenan?

A. No. I was in a hurry. When you're working out in the field, you're in a hurry, you just sign it and give it back. You look at the top of the load and you look at the big numbers, and that's it. That's what you remember. You don't look at the little.

Q. Why is it that Keenan sticks out in your mind?

A. Just the way the -- their K and stuff is all -- I don't know. Maybe it's through the years, maybe it's worked into my head. I don't know.

Q. But as you sit here today, you can't recall the names of any other suppliers on any of those invoices that you reviewed at McKinleyville?

[¶] ... [¶]

THE WITNESS: That's correct.

(Opinion p. 6-8 [12 RT 3412:22-3414:8; 3415:9 – 3416:2].)

III. Glamuzina's testimony disproves Plaintiffs' claims of "corroborating" facts.

Plaintiffs argue that the proximity of a Keenan branch in Eureka, California, corroborates Glamuzina's recollection of seeing "Keenan" invoices, though Glamuzina testified that he had never been to a Keenan facility and did not know where any Keenan facility was located. Plaintiffs contend that the mere existence of a logo on an invoice (like any other company would have) corroborates Glamuzina's testimony, though Glamuzina himself never described a logo.

A. The geographic location of a Keenan branch had no bearing on Glamuzina's testimony.

The purported invoices Glamuzina claimed to have seen 40 years ago are the only foundation for his testimony that Keenan was the supplier:

> Q. Have you ever been to a Keenan facility?
>
> A. No.
>
> Q. Do you know where Keenan was located?
>
> A. No.

Q. And I believe when your counsel was asking you questions, you had mentioned that [Mike] Mitrovich[1] would get supplies from Southern California; is that right?

A. Mike was a funny guy. He would order pipe, I don't know why he'd order pipe down there, and it would always come from up north or wherever we were working, it would always come from a different place. I don't know how his style of ordering was.

Q. You don't know why he would order pipe from Southern California?

A. No, I couldn't figure him out.

Q. Did you ever have any conversations with Mike about why he was ordering pipe from Southern California?

A. No.

Q. Can you estimate approximately how many times you saw Keenan written on invoices of materials that were being supplied to the McKinleyville jobsite?

A. I couldn't estimate that, no.

Q. Can you estimate the year you first saw Keenan written on an invoice that was for a McKinleyville jobsite?

A. No, I couldn't.

Q. How about the last year you saw Keenan written on an invoice?

A. Just when I was up there the last time, that's the only time I ever -- when I was up there at McKinleyville, that's about the only time I remember.

[1] Mike Mitrovich, now deceased, and his wife, Olga Mitrovich, were the owners of Christeve. (9 RT 2422:18-21.)

> Q. Have you ever had any communications with anyone you believed to be employed by Keenan?
>
> A. No.

(12 RT 3417:18-3419:2)

The Google map on page 15 of Petitioner's brief is not in the trial record, not part of the appellate record, and is simply a red herring. Glamuzina was not involved in ordering materials. He had no knowledge of a local Keenan branch. Glamuzina understood that Christeve was ordering materials from Southern California. A Keenan location in Eureka was a coincidence that had no bearing on the narrow scope of Glamuzina's testimony, which is based on nothing more than disputed writings that he last saw 40 years before his deposition.

B. Glamuzina did not describe a Keenan logo.

Plaintiffs and the Trial Court conclude that Glamuzina's testimony is "consistent with an exemplar of a Keenan invoice, which has a logo of a large 'K'." (1 AA 118; Plaintiffs' Brief at 44.) However, while Glamuzina testified that he saw the word "Keenan" on the disputed invoices, Glamuzina made no reference to a logo, trademark, emblem, design, or insignia. He did not say those words. He also did not say the words "circle" or "large."

Glamuzina merely said: "their K and stuff:"

> Q. Why is it that Keenan sticks out in your mind?
>
> A. Just the way the -- their K and stuff is all -- I don't know. Maybe it's through the years, maybe it's worked into my head. I don't know.

(12 RT 3415:17-20.)

We do not know whether Glamuzina was referring to a name, logo, or something else. Conversely, the record is clear that Glamuzina could not recall any details regarding the "Keenan" name on the invoices:

> Q. How was Keenan written on the invoices?
>
> A. I thought it was, if I can remember right, I think it was like a print, I'm not positive, like a black print or -- I can't -- to be honest, I can't recall exactly.
>
> Q. Do you know if it just said "Keenan" or if there were any other words?
>
> A. I couldn't answer that.

(12 RT 3413:1-8.)

Though the Trial Court cited to an exemplar invoice's "large 'K'" (1 AA 118), Glamuzina did not describe the size of the "K," large or otherwise. (12 RT 3412:22-3413:8, 3415:17-20.) Plaintiffs' Brief describes Keenan's logo as "a capital 'K' within a circle." (Plaintiffs'

Brief at 18.) Glamuzina did not provide any such description. Plaintiffs describe the Keenan logo as an illustration of pipe fashioned to resemble a "K." (Plaintiffs' Brief at 18.) Again, this has no relation to any testimony provided by Glamuzina.

It was the Trial Court, *not* Glamuzina, who saw an exemplar invoice. Glamuzina's "K and stuff" statement is devoid of context, yet the Trial Court made the determination that Glamuzina's scant description was "consistent with an exemplar of a Keenan invoice" for the purposes of authentication. (1 AA 118-119.) At the very least, Glamuzina should have been shown the exemplar invoice to compare against his own recollection. However, Plaintiffs intentionally obstructed any chance to do so.

C. Plaintiff counsel intentionally prohibited the showing of exemplar invoices to their client, John Glamuzina.

Though not a party, Glamuzina was represented by Plaintiffs' attorneys for this case. (9 RT 2531:15-20, 2532:11-13 [Plaintiff counsel states in a pretrial hearing that he represents Glamuzina]; *but see* 17 RT 4904:8-10 [Plaintiff counsel tells the jury during closing argument that Glamuzina is not his client and only represented him for the deposition].)

Glamuzina was 81 years old when his deposition was videotaped on March 13, 2017. (12 RT 3393:18-22; 3394:13-14.) At deposition, Glamuzina recalled the purported Keenan invoices, though he could not recall the president of the United States for the period he worked at McKinleyville. (12 RT 3409:2-11 ([Q. Do you recall who the president of the United States was at the time? Just trying to do something to refresh your recollection. A. No, no, I don't. I must be getting old.])

Keenan properly served Glamuzina with a trial subpoena, to which plaintiff counsel responded that Glamuzina was too ill to testify. A telephonic hearing outside the presence of the jury was subsequently held with Glamuzina's physician, Dr. Timothy Cooper. (9 RT 2526:21-2527:2.) Dr. Cooper stated that Glamuzina had several health conditions that prevented him from travelling, but that he could "absolutely" provide testimony via live video feed. (9 RT 2531:15-20.) However, plaintiff counsel, acting as Glamuzina's attorney, refused to stipulate to a live video feed. (9 RT 2557:12-20 ["as counsel is aware, we do represent him, so I can't compel him to do something that he doesn't want to do."]) The Trial Court then declined to compel Glamuzina's testimony through live video feed due to lack of legal

authority for such an order. (9 RT 2560:4-2561:9.) Finding Glamuzina unable to travel and therefore "unavailable," the Trial Court allowed Glamuzina's videotaped deposition testimony to be played to the jury over Keenan's objections. (9 RT 2561:10-2562:24.)

Incredibly, Plaintiffs now argue that the Court must consider exemplars of Keenan invoices for purposes of authentication and corroborating hearsay when they themselves refused to show him any of those documents and expressly refused to allow Glamuzina to be examined at trial.

IV. Christeve had a standing relationship with Johns-Manville, not Keenan.

Plaintiffs incorrectly assert that Keenan had a "standing relationship" with Christeve as evidence corroborating Glamuzina's testimony. This is another contention by Plaintiffs that is contradicted by the record.

Olga Mitrovich and her now-deceased husband, Mike Mitrovich, were the owners of Christeve, the contractor that employed Hart during his work at McKinleyville. (9 RT 2422:18-21.) As with Glamuzina, Plaintiffs' attorneys represented Olga Mitrovich during the course of the litigation, though she was not a party and had no claims of her own.

(9 RT 2495:21-2496:1.) Olga Mitrovich testified that Christeve was formed in 1972. (9 RT 2424:5-15.) Mrs. Mitrovich ran the office, paid the bills, did the payroll, and performed general office work. (9 RT 2425:16-21.) Though she recalled a K with a circle around it for the Keenan logo, *she did not know if Keenan was a supplier to the McKinleyville job or if Christeve ever ordered asbestos-cement pipe from Keenan.* (9 RT 2462:5-11, 2463:10-22.)

Olga Mitrovich testified that the Christeve employees at McKinleyville were John Glamuzina, Lloyd Calvert, Georgie Martinez and brothers Chuck and Pete Janich. (9 RT 2435:20-2436:3; 2426:20-2427:9.) Other than Glamuzina, these men are all now deceased. (9 RT 2433:11-2434:3.)

Mrs. Mitrovich did not know how the pipe was delivered to McKinleyville. (9 RT 2441:18-20.) She paid invoices based on delivery tickets provided by workers in the field. (9 RT 2441:24-2442:18.) Neither Olga Mitrovich nor Christeve had any delivery tickets from the McKinleyville job. (9 RT 2444:23-2445:1; 2447:21-23.) Christeve wound up its business in 2001. (9 RT 2447:11-16.) All of Christeve's documents were destroyed in 2002. (9 RT 2445:2-10.)

During discovery, Keenan was able to obtain authenticated records from the Johns-Manville document repository. One of these documents is an invoice from Johns-Manville for asbestos-cement pipe shipped directly to Christeve at McKinleyville on November 8, 1976 (the "November 8, 1976 Invoice"). (9 RT 2452:19-2454:22, 2467:9-2468:25; 1 AA 125.) Olga Mitrovich received this invoice in the mail from Johns-Manville. (9 RT 2468:4-11.) She held it, read it, and wrote on it. (9 RT 2468:12-20.) It bears Mitrovich's *own handwriting*, as she wrote on this document when she compared a delivery slip to the invoice, and then requested a credit for materials not delivered.[2] (9 RT 2453:2-2454:22, 2455:9-19.)

Mitrovich also testified that she recognized the name of the Johns-Manville salesman, Lou Tanos, found on an internal memo from Johns-Manville. (9 RT 2485:5-25, 1 AA 140.) Her husband talked to Tanos in regard to buying products from Johns-Manville. (9 RT 2486:9-18.) In addition to the November 8, 1976 Invoice, Mitrovich recognized a second Johns-Manville invoice with her *own handwriting*.

[2] This document was marked and admitted as exhibit 10060. At trial, plaintiff counsel falsely asserted that it had been altered to omit Keenan's name as the supplier, as discussed in detail below.

(9 RT 2488:7-22, 2 AA 151.) This invoice was also for materials shipped directly to McKinleyville. Mitrovich testified that she again was seeking a credit directly from Johns-Manville when she wrote on this invoice. (9 RT 2489:2-8.) Mitrovich then recognized a third document obtained from the Johns-Manville repository, which was a letter Mitrovich drafted on Christeve's letterhead and signed by her husband, requesting a credit from Johns-Manville for materials stolen from the McKinleyville jobsite after they had requested Johns-Manville to pick-up the unused pipe. (9 RT 2491:19-2493:6, 1 AA 133-134.)

There is no dispute that Christeve received invoices and communicated directly with Johns-Manville for products, including asbestos-cement pipe, purchased for installation at McKinleyville when Hart was present. These documents span the period for the entire McKinleyville project without any mention of another source or supplier for pipe. There was no business relationship with Keenan to corroborate Glamuzina's testimony.

V. The Thibodo will-call invoice was a ruse to confuse the jury that Plaintiffs are furthering on appeal.

Plaintiffs assert that Keenan previously supplied asbestos-containing pipe to McKinleyville, arguing that "[t]he undisputed

evidence shows that on an earlier project phase, won by Christeve's competitor Thibodo, the Johns-Manville pipe was supplied by Keenan. [15 RT 3242:3-19; 13 RT 3711:17-3712:16 (admitted by Keenan representative Garfield)]." (Plaintiffs' Brief at 16.) Plaintiffs' "undisputed evidence" is one invoice for $113.87 to Thibodo for materials purchased at Keenan's branch. (*See* RA063.) The Thibodo invoice was for "will-call," meaning that the contractor had to pick-up the materials at Keenan's branch; they were not delivered by Keenan. (13 RT 3681:9-16; 3712:17-20.) The testimony of Keenan's President was that he was shown *a* document indicating *a* sale to *different contractor* working on a *different part of the project* and that he had "no information that anything was sold to the McKinleyville sewer district while Mr. Hart was there." (15 RT 3242:3-19; 13 RT 3711:17-3712:16.) This evidence fails to support a circumstantial inference that Keenan *delivered* asbestos-containing pipe to McKinleyville in the relevant period.

At trial, plaintiff counsel announced to the jury that the Thibodo invoice should be marked as exhibit "2124'A'" to falsely infer that

there were more invoices like this as part of a larger exhibit.[3] (13 RT 3712:21-3722:6.) Plaintiffs are now simply trying to muddle the record on appeal with the same deceptive tactic.

VI. Plaintiffs' assertion that Keenan had relevant documents that were "destroyed" is pure speculation without evidentiary support.

Plaintiffs repeatedly assert that Keenan "destroyed" its invoices to support an erroneous presumption that the documents referred to by Glamuzina actually came from Keenan, "making the admission of the actual invoices impossible." (Petitioners' Brief at 11.) This assertion assumes that the invoices existed at all, which Keenan disputes.

All of the documents for Keenan Pipe & Supply, and its computer system, became Hajoca's after the sale in 1983. (13 RT 3739-3741.) The Court of Appeal stated, "Keenan either disposed of all its documents or transferred them to its successor in 1983," and the

---

[3] Plaintiff counsel feigned innocence, but used the same ploy to argue in front of the jury that he would provide a document marked "10060'A'" because Keenan's Exhibit 10060 "was cut off" and that there was another version that was complete showing Keenan as the supplier. Exhibit 10060 is the November 8, 1976 invoice showing that Christeve purchased the pipe it used at McKinleyville directly from Johns-Manville. See Section VII(B)(2), below.

successor testified that if documents were transferred to it, they were destroyed." (Opinion at 9; 8 RT 2211:15-2212:13, 2213:19-2214:11, 2220:16-2221:16, 2234:3-8, 2239:23-2240:1.) Plaintiffs' suggestions of spoliation are baseless. Conversely, authenticated invoices from Johns-Manville to Christeve for transite delivered to McKinleyville exist and could have been admitted at trial.

VII. In contrast to Glamuzina's unsupported hearsay, authenticated Johns-Manville documents corroborated by witness testimony were excluded as untrustworthy.

A. The Johns-Manville documents are authentic and reliable.

During the course of discovery, Keenan was able to obtain documents proving the direct sale and delivery of asbestos-cement pipe from Johns-Manville to Christeve for use at McKinleyville the entire period Hart was present. These records were obtained from the Claims Resolution Management Corporation ("CRMC") document repository in Aurora, Colorado, as described below.

The Manville Trust emerged from the Johns-Manville bankruptcy proceedings to respond to asbestos-related claims. The CRMC was created by the Manville Trust in 1998 as a wholly owned subsidiary. (16 RT 4570:19-4571:4; 4572:3-6.) The CRMC currently

maintains the historical records of the Johns-Manville Corporation for the purposes of asbestos-related litigation. (16 RT 4571:5-4572:6.)

Since 1988, Margaret Baumgardner has served as the custodian of records and research coordinator for the CRMC. (16 RT 4570:2-8; 4581:4-582:10; 4584:19-4585:7.) Baumgardner testified that teams went to Johns-Manville facilities across the country to gather records. (16 RT 4572:17-4573:21; 4578:12-25.) The Manville Trust employed as many as 300 paralegals, clerks, and assistants to retrieve documents, with strict instructions to obtain every document. (16 RT 4575:14-4576:21.) "[E]verything that looked like a document, sounded like a document was gathered, put in boxes to be put into the production." (16 RT 4574:20-4575:13.)

The documents were boxed and labelled as to the location where they were obtained. (16 RT 4576:20-4577:15.) The total number of documents obtained by the Manville Trust grew to approximately 40,000 boxes. (16 RT 4577:16-4578:14.)

Since they have been gathered, the Johns-Manville documents have been stored in secure facilities with restricted access. (16 RT 4579:7-15, 4583:11-17.) All people who have had access to the records

have been monitored. (16 RT 4583:18-4584:2.)

The documents gathered by the Manville Trust are generally and routinely accepted as reliable in asbestos litigation. Plaintiffs' own state of the art expert, Barry Castleman, Ph.D., testified in deposition that he has personally researched thousands of Johns-Manville documents kept at the repository. (1 AA 107:24-108:9, 109:7-13.) Dr. Castleman relies on information from the documents and testified that the documents truly reflect what Johns-Manville was saying to people and "doing at the time." (1 AA 111:18-112:3.) Dr. Castleman went on to testify that "in the 30-plus years I've been reading corporate documents that have come up in legal discovery or through other means of research, I've never found any of those documents to have been altered, falsified, or forged. So generally, I regard these [Johns-Manville] documents as being what they purport to be." (1 AA 112:5-14.) Notably, Plaintiffs withdrew Dr. Castleman as an expert after his deposition.

B. The Johns-Manville documents were directly corroborated by testimony from Hart and Mitrovich but excluded by the Trial Court.

The Trial Court liberally allowed the hearsay testimony of

Glamuzina, though he was the only person to assert that the invoices existed, and he could provide no details regarding the purported invoices. In contrast, the Trial Court strictly interpreted hearsay law to exclude Johns-Manville documents offered by Keenan.

Before opening statements, Keenan moved to admit into evidence several key documents it had obtained from searches conducted at the Johns-Manville repository. (7 RT 1828:8-1860:24, 1 AA 079.) Such documents included a Johns-Manville internal memo regarding the McKinleyville project that specifically referred to Olga Mitrovich and contained her phone number. (1 AA 100.) Another Johns-Manville memo summarized Johns-Manville's direct sales to Christeve for the McKinleyville project and listed Mike Mitrovich and Christeve supervisor Chuck Janich as contacts. This memo states that Christeve "are successful contractors with good credit and apparently ***are buying from J-M [Johns-Manville] whenever our sewer pipe is specified on the job***." (1 AA 127 [emphasis added].)

The November 8, 1976 Invoice, discussed above in regard to the testimony of Olga Mitrovich, is an invoice from Johns-Manville to Christeve for delivery of asbestos-cement "transite" pipe to the

McKinleyville job bearing a "ship date" of November 8, 1976, which is during the period Hart worked on the McKinleyville job. The November 8, 1976 Invoice is identical to subpart 10 of Johns-Manville Master Invoice 62094A. (1 AA 125, 2 AA 165).

Johns-Manville Master Invoice 62094A consists of 22 subparts, each of which identifies a shipment of Johns-Manville asbestos-cement transite pipe from Johns-Manville directly to Christeve at McKinleyville. (2 AA 155-178.) All but one shipment occurred between November 1976 and March 1977, matching the dates of Hart's work at McKinleyville. (2 AA 155-178.) The shipment on November 8, 1976, reflected in subpart 10 to Johns-Manville Master Invoice 62094A (2 AA 165), directly correlates to the November 8, 1976 Invoice (1 AA 125), that Christeve owner Olga Mitrovich received during the McKinleyville project (9 RT 2468:9-20).

Keenan did not obtain the majority of the exculpatory Johns-Manville documents until the last days of discovery, after Olga Mitrovich had been deposed. (2 RT 314:8-16.) The trial court denied Keenan's motion to re-depose Mitrovich in regard to the newly discovered evidence. (3 RT 622:14-624:6.)

1. The Trial Court strictly interpreted hearsay law to exclude documents exculpating Keenan.

This being a preference case with accelerated discovery deadlines, and with the relevant events occurring more than four decades ago, and with the majority of documents found just days before trial (1 AA 084), Keenan was unable to locate a witness who could testify regarding the mode of preparation of the Johns-Manville documents.[4] The Trial Court found that the Johns-Manville documents were authentic, but did not fall within the business records exception set forth in Evidence Code section 1271. (7 RT 1829:15-1830:14, 1833:11-20.) The Trial Court reasoned that, "Baumgardner's testimony . . . indicates she doesn't know how the documents were created, she doesn't know anything about the mode of preparation, she doesn't know how the documents were used." (7 RT 1832:3-9.) The Trial Court further rejected argument by analogy to the bank records exception stated in *People v. Dorsey*, (1974) 43 Cal.App.3d 953, 961. (7 RT

---

[4] The Trial Court granted preference status pursuant to Code Civ. Proc. § 36(a) after Dr. Robert Fallat executed a declaration stating there was substantial medical doubt of Mr. Hart's survival beyond six months. (1 AA 057.) Plaintiffs' complaint was filed November 8, 2016. The Trial Court set trial for June 12, 2017, 115 days from the February 17, 2017 hearing date for the preference motion and seven months after Plaintiffs' complaint was filed. (*Id.*) This case remains today a preference case on appeal.

1832:17-1833:10.)

The Trial Court required surrounding circumstances, testimony of a witness or something outside the documents themselves regarding the mode of preparation, that would allow a conclusion of trustworthiness for admission of the Johns-Manville documents. (7 RT 1833:11-17; 1855:19-1856:18.)

In contrast to the Trial Court's liberal application of hearsay exceptions to admit Glamuzina's testimony, the Trial Court rejected Keenan's argument that *the subject matter, dates, names, phone numbers and addresses in the authentic 40-year-old Johns-Manville documents exactly match testimony provided by Frank Hart and Olga Mitrovich.* (7 RT 1841:3-8.) Trial Court ruled that those undisputed facts were insufficient corroborating evidence to deem the Johns-Manville documents trustworthy enough for admission into evidence. (7 RT 1833:11-17; 1855:19-1856:18; 1841:3-8.)

The Trial Court only allowed the admission of documents where Mitrovich recognized her handwriting or husband's signature. The November 8, 1976 Invoice (1 AA 125) with Mitrovich's notations was admitted before the start of trial. (7 RT 1834:2-1835:1.) Later, after

Mitrovich provided testimony at trial that she recognized her handwriting on a second invoice (discussed above), the Trial Court admitted that document into evidence. (9 RT 2488:4-22, 2496:22-2497:5, 2 AA 151.) The Trial Court similarly admitted the letter from Christeve to Johns-Manville (discussed above) into evidence after Mitrovich identified her husband's signature on that document during trial cross-examination. (9 RT 2491:19-2493:6, 9 RT 2497:21-2498:11, 1 AA 133-134.)

2. The Trial Court denied Keenan's renewed motion to admit Invoice 62094A after misconduct by plaintiff counsel.

When the November 8, 1976 Invoice (1 AA 125) was admitted into evidence, plaintiff counsel announced before the jury that the November 8, 1976 Invoice had been "chopped off by the defense" to infer that the original document identified Keenan as the supplier. (13 RT 3608:19-3609:7.) As such, the false statement by plaintiff counsel made the entirety of the Johns-Manville Master Invoice 62094A (2 AA 155-178) admissible not only for its undisputed reliability, but also in rebuttal to Plaintiffs' false assertion to the jury. Plaintiffs opened the door for Keenan to introduce the entirety of the Invoice 62094A upon

the rule of completeness and to mitigate the effect of plaintiff counsel's misstatement. Regardless, the Trial Court refused to grant Keenan's renewed motion to admit on these grounds. (15 RT 3267:1-3273:5.)

Contrary to Plaintiffs' arguments, there are no additional corroborating facts omitted by the Appellate Court. Plaintiffs' factual arguments are contradicted by the actual record on appeal. Moreover, Plaintiffs' legal arguments are disproved by applicable California law.

ARGUMENT

The Court of Appeal correctly held that Glamuzina's testimony regarding invoices he last read in 1977 was hearsay without exception. Further, given the few details provided by Glamuzina regarding the alleged documents, the Court of Appeal appropriately found that there was insufficient evidence to authenticate the documents, the only evidence of which is Glamuzina's testimony. Plaintiffs sought review on both points.

I. Standard of review: abuse of discretion.

An appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion. (*Osborne v. Todd Farm Service* (2016) 247 Cal.App.4th 43, 50.) This standard of review

applies to the trial court's determination of whether proffered evidence constitutes inadmissible hearsay and whether evidence should be excluded in limine. (*Id.* at 50-51.)

II. Glamuzina's testimony offered for the truth of the matter has no independent relevance as merely evidence of identification.

A. The *only* evidence offered by Plaintiffs to prove that Keenan was a supplier to Hart's work was inadmissible hearsay.

At trial, Plaintiffs presented deposition testimony from only one coworker witness, Glamuzina, stating that he signed "invoices" with the "Keenan" name that were purportedly for shipments of Johns-Manville transite pipe. *Without dissent on this point, the Court of Appeal correctly found this was hearsay.*[5] (Opinion at 12; Dissenting Opinion at 19.)

---

[5] The Court of Appeal found only the single layer of hearsay. (Opinion at 12, fn. 5.) However, Keenan does not concede that what Glamuzina described were Keenan documents. Based on his testimony, it is equally plausible that the writing Glamuzina testified that he saw was a "delivery ticket" (*see, e.g.*, Testimony of Olga Mitrovich, 9 RT 2442:2-24), "shipping manifest" (*see, e.g.*, Plaintiffs' Opening Statement, 8 RT 2129:22-24, 2131:5-8), or a "shipping invoice," written by a third party common carrier (*see, e.g.*, 1 AA 130-131, 138 for examples of "shipping invoices"). It is no more speculative that the documents described by Glamuzina were written by a third party as it is that they were written by Keenan. If they were written by a third party, the documents are double hearsay. The documents do not exist, so it is impossible to decipher who authored the documents or what

"'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code § 1200(a).) "Hearsay evidence is inadmissible, unless it falls under an exception. (Evid. Code § 1200(b).) Double hearsay is not admissible unless "each level falls within an exception to the hearsay rule." (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 680.)

Invoices, bills, or receipts are inadmissible hearsay, unless offered for the limited purpose of corroborating a witness's testimony." (Opinion at 8, *citing Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 42–43; *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1267.)

> Glamuzina's belief that Keenan supplied the asbestos-cement pipe was based on his review of invoices or delivery tickets. The wording on these invoices or delivery tickets were out-of-court statements offered to prove the truth of the matter asserted: namely, that Keenan supplied the pipes. *The invoices described by Glamuzina were hearsay.*

---

they actually represented, both of which factor into the analyses of hearsay, authentication, and secondary evidence herein.

(Opinion at 9 [emphasis added], citing *Pacific Gas*, *supra*, 69 Cal.2d at pp. 42–43.) The Court of Appeal did not equivocate in finding that Glamuzina's testimony regarding the disputed writings was hearsay:

B. Plaintiffs' argument that the "'K' logo and 'Keenan' name were non-hearsay circumstantial evidence of identity" is contradicted by the record.

Glamuzina *never* testified "that he saw the distinctive 'K' logo and 'Keenan' name on the invoices accompanying the asbestos-cement pipe deliveries to Mr. Hart's jobsite." (Petitioners' Brief on the Merits at 32.) Glamuzina *never* used the word "logo" or any synonym thereof to describe anything he saw on the disputed writings. Glamuzina *never* referred to the "K" as being "distinctive." While he testified that he saw "Keenan" on the writings, the reference to recalling a "K" was an ambiguous response as to how he recalls Keenan 40 years later:

> Q. Why is it that Keenan sticks out in your mind?
>
> A. Just the way the -- their K and stuff is all -- I don't know. Maybe it's through the years, maybe it's worked into my head. I don't know.

(12 RT 3415:17-20.) The record contains absolutely no explanation of what Glamuzina meant when he said, "their K and stuff." It is Plaintiffs' and the Trial Court's speculation that Glamuzina was referring to a "logo" with this testimony. (*See*, *e.g.*, 1 AA118-119; 8

RT 2130:9-11 [Plaintiffs' Opening Statement: "And [Glamuzina] told them, he said, I remember the logo. I remember the K, the Keenan K logo . . ."].)

The only person who can tell us what was meant by "their K and stuff" is Glamuzina. Although Glamuzina was cleared by his physician to testify at trial via live video feed, Plaintiff counsel, also acting as Glamuzina's counsel, refused to agree to this method of examination. (9 RT 2557:12-20.) Now Plaintiffs ask the Court to adopt their speculation as to what Glamuzina meant.

C. Glamuzina's testimony regarding Keenan invoices cannot be distinguished from hearsay based on the contents of a writing.

Glamuzina's testimony regarding the invoices was used to establish that Keenan supplied Johns-Manville asbestos-cement "transite" pipe to the McKinleyville jobsite. Without Glamuzina's testimony regarding these invoices, which Keenan contends never existed, Plaintiffs have no evidence that Keenan supplied asbestos-cement pipe to Christeve at the McKinleyville job.

As the Court of Appeal correctly understood, Glamuzina's testimony was not offered for mere identification: "The information

Glamuzina observed on invoices or delivery tickets was an out-of-court statement used to show Keenan supplied asbestos containing pipes; the statement was offered for the truth of that matter." (Opinion at 10.)

Plaintiffs attempt to distinguish *Pacific Gas*, *supra*, 69 Cal.2d at 42-43, by emphasizing that the alleged writings in that opinion were from a third party. (Plaintiffs' Brief at 33.) While this analysis may be relevant to finding an exception to the hearsay rule, the fact that the invoices were from a third party does not negate that invoices are inadmissible to prove that certain acts were done. (*Pacific Gas*, *supra*, 69 Cal.2d at 42-43.)

The writings described by Glamuzina were not offered for the mere purpose of identity of the declarant, but to prove that Keenan sold and/or delivered the asbestos-containing "transite" pipe on the truck. Plaintiffs did not use Glamuzina's testimony regarding the purported writings to just prove identity. On appeal, Plaintiffs are attempting to repackage the evidence to suggest that the alleged writings are merely circumstantial evidence of identity. This belies the purpose to which Plaintiffs put the oral testimony regarding the writings to at trial. Glamuzina's testimony was offered as "*direct evidence*" to prove the

pipe on the truck was asbestos-containing transite pipe supplied by Keenan.[6] (12 RT 3400:19-23.) On closing argument, Plaintiffs claimed Glamuzina's testimony that Keenan supplied thousands of feet of Johns-Manville transite pipe to McKinleyville as "*direct evidence*," adding "*[y]ou don't need anything more than that*." (17 RT 4833:4-14 [emphasis added].)

The disputed writings went beyond proving Keenan was present at the McKinleyville site (*see People v. Williams* (1992) 3 Cal.App.4th 1535, 1541-43), or that *a* company called "Keenan" was on the site (*see People v. Freeman* (1971) 20 Cal.App.3d 488, 492). The facts for the cases cited by Plaintiffs have no similarity to the actual facts in *Hart* and do not apply by analogy.

In *Williams*, a fishing license and two checks bearing the defendant's name were found at an apartment where marijuana and cocaine were also discovered during the execution of a search warrant. (*Williams, supra,* 3 Cal.App.4th at 1537.) While the search was

[6] The "invoices" were required for Glamuzina to opine that the pipe on the delivery trucks was asbestos-containing "transite" pipe. Without the invoices, Glamuzina lacked the foundational knowledge to provide expert opinion on the type of pipe observed. (*See People v. Chapple* (2006) 138 Cal.App.4th 540, 548.)

continuing, the defendant drove up and parked in front of the apartment. (*Id.*) The writings were admitted as nonhearsay circumstantial evidence that a person with the same name as the defendant resided in the apartment, "regardless of the truth of any express or implied statement contained in those documents." (*Id.* at 1542.) The court's conclusion in *Williams* was specific: "when introduced for the purpose of showing that residency, [the documents] are admissible nonhearsay evidence." (*Id.* at 1542-43.) Residency is not synonymous with identification.

The contents of the writings described by Glamuzina were a necessary component to proving Plaintiffs' assertion that Keenan supplied the pipe at issue. In other words, Glamuzina's testimony was not used for the single purpose of showing that Keenan was at the McKinleyville job site. Glamuzina was permitted to testify that he examined the contents of the disputed writings and double-checked the contents against what was supposed to be on the truck. (12 RT 3403:23-3404:2.)

Similarly, in *People v. Freeman* (1971) 20 Cal.App.3d 488, 492, a witness recounted hearing her daughter greet someone at the house

with the words, "Hi, Norman." The court found that, "the fact that the statement 'Hi, Norman' was made tended to prove circumstantially that one Norman had come to the house of a person associated with Foster, the alleged associate of Norman Freeman in the armed robbery." (*Id.*) Glamuzina's testimony regarding the writings cannot be carved out to a simple statement of identity; namely, that *a* company called "Keenan" had come to the McKinleyville site. Nor was this the actual purpose for which the testimony was offered at trial.

The writings described by Glamuzina were not offered for the mere purpose of identity of the declarant, but to prove that Keenan sold and/or delivered the asbestos-containing "transite" pipe on the truck. Glamuzina testified that the delivery truck driver "would have an invoice of his load, what he had on his load, and I'd double-check it." (12 RT 3403:23-3404:2.) As the Court of Appeal stated, one "cannot disregard the truth or falsity of the out-of-court statements at issue." (Opinion at 11.)

Plaintiffs contend that Glamuzina's testimony stands apart from the hearsay rule, asserting "[w]here 'the very fact in controversy is whether certain things were said or done and not . . . whether these

things were true or false, . . . in these cases the words or acts are admissible not as hearsay[,] but as original evidence.'" (1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 31, p. 714.) In this case, the controversy encompasses not just "whether certain things were said or done," *but also* "whether these things are true or false." This Court held that invoices were inadmissible as hearsay with respect to the truth of whether certain acts had been done. (*Pacific Gas*, *supra*, 69 Cal.2d at 42.) Glamuzina's testimony regarding the writings was improperly admitted to prove the truth of whether Keenan supplied asbestos-containing pipe to the McKinleyville job. The alleged writings are hearsay without exception.

D. The holding of *Osborne v. Todd Farm Service* required the Trial Court to exclude Glamuzina's hearsay testimony based on the contents of unauthenticated invoices.

In *Osborne*, *supra*, 247 Cal.App.4th 43, the court addressed whether testimony based on the contents of an unavailable receipt constituted inadmissible hearsay. The *Osborne* plaintiff was a horse stable worker who was seriously injured while moving hay bales. She climbed to the top of a stack of hay bales to throw one of the upper bales down to the ground. "When she inserted hay hooks into the bale

to move it, the bale gave way, causing her to fall 11 feet to the ground." (*Id.* at 45.) The plaintiff was severely injured in the fall, and neither the bale nor its strapping was preserved after the fall. (*Id.*)

Todd Farm Service ("Todd") sold and delivered the hay bale to plaintiff's place of employment. "Todd produced documents indicating that it purchased hay from three suppliers in the six months before appellant's accident. One of those suppliers is Berrington Custom Hay Stacking and Transport, Inc. (Berrington), located in Nevada. Todd's other suppliers are located in Southern California." (*Osborne*, 247 Cal.App.4th at 45.) Plaintiff alleged that Berrington manufactured the bale that injured her and sold it to Todd. (*Id.* at 46.) However, there were no documents or information from Todd indicating which supplier's hay bales were delivered to a particular customer. (*Id.* at 46.)

In addition to other testimony regarding the origin of the defective hay bale, plaintiff offered to testify that "she saw the delivery men with a receipt identifying Berrington as the supplier of the hay bales." (*Osborne*, *supra*, 247 Cal.App.4th at 47.) The plaintiff offered to testify that Todd's delivery person, who died before trial, told her the hay bales came from Berrington. (*Id.*) As in the instant matter, the

plaintiff in *Osborne* did not have the receipt. (*Id.*) There was only a single witness in *Osborne* who claimed to have seen the alleged receipts and no other documentary evidence regarding the receipt or supplier was produced by the parties. (*Id.*) The appellate court in *Osborne* held that "[t]his testimony was properly excluded as hearsay because appellant offered it to prove the truth of her assertion that the hay bale involved in her accident was supplied by Berrington. (Evid. Code, § 1200.)" (*Id.* at 52–53.)

Specifically, the *Osborne* trial court excluded the plaintiff's proffered testimony that she saw Todd's delivery person with a delivery "ticket" identifying Berrington as the source of the hay bale: "Writings, such as a delivery receipt, must be authenticated before they, or secondary evidence of their contents, may be admitted into evidence. (Evid. Code, § 1401.) Authentication means evidence that the writing is actually what its proponent claims it to be." (*Osborne*, *supra*, 247 Cal.App.4th at 53.) In upholding the trial court's decision, the appellate court found that plaintiff "did not possess the physical document to which her testimony referred" and no other witness claimed to have seen it, referring *specifically* to that ticket. (*Id.* at 53.) The holding in

Osborne directly applies to the facts of this case, requiring the exclusion of Glamuzina's hearsay testimony regarding the disputed writings.

E. The Trial Court misinterpreted *Osborne* when it denied Keenan's motion to exclude hearsay testimony.

Keenan similarly moved to exclude the hearsay testimony of Glamuzina based on his reading of invoices that were not produced, not authenticated, and seen only by Glamuzina over four decades ago. After extended oral argument, the Trial Court issued a written order denying Keenan's motion in limine in which it narrowly limited *Osborne* to the issue of discovery sanctions. (1 AA 117.)

The Trial Court's ruling disregarded precedent directly on point. The *Osborne* opinion is not limited to discovery sanctions. The *Osborne* court first reviewed the trial court's ruling excluding the plaintiff's proposed testimony that she saw a delivery receipt identifying Berrington as the source of the hay bales under an abuse of discretion standard. The testimony regarding the receipts and the delivery truck driver's statement that the bales came from Berrington were both "properly excluded as hearsay because appellant offered it to prove the truth of her assertion that the hay bale involved in her accident

was supplied by Berrington." (*Osborne*, *supra*, 247 Cal.App.4th at 52–53.)

III. The invoices seen only by Glamuzina must be authenticated before there can be a finding of a party admission under Section 1220, and there is no proof that Keenan issued the invoices other than Glamuzina's circular hearsay testimony.

The trial court found that the disputed writings were a party admission under Section 1220 and, therefore, admissible as an exception to the hearsay rule. (1 AA 118.) However, the Opinion of the Court of Appeal follows established law regarding the party admission exception to the hearsay requirement; namely, as a preliminary fact, the identity of the declarant in connection with alleged admissions must be determined. (Opinion at 12-13, quoting *Pansini v. Weber* (1942) 53 Cal.App.2d 1, 5 ["[I]n order to bring a statement or declaration within the operation of the rule contended for it must be shown that the statement or declaration was signed or made by the party against whose interest it is sought to have it apply; and that is not the situation here presented."]; *see also*, D. Hearsay Exceptions, Cal. Prac. Guide Civ. Trials & Ev. Ch. 8D-D.) Put differently, the analysis of whether Keenan made the purported statements at issue goes hand-in-hand with the analysis for authentication. "Where the admission is a

written one, there must be some proof of the authenticity of the writing." (*Lewis v. W. Truck Line* (1941) 44 Cal.App.2d 455, 465.)

As this Court has long observed, some level of caution is necessary to protect against the erroneous transmissions of writings allegedly attributable to a party. (*See Grimes v. Fall* (1860) 15 Cal. 63.) In *Grimes*, this Court was faced with the difficulty of proving the truth of whether an action was done based only on a witness's oral evidence of a writing. (*Id.* at 65.) Grimes was a trespass action in which the defendants were alleged to have built a dam that flooded a mining claim on which the plaintiff was to build a flume. (*Id.* at 64-65.) The plaintiff's only evidence that defendant Fall was liable was that a witness "heard Fall . . . say that the contract to [defendant] Hart (the original contractor) had been assigned to him." (*Id.* at 65.) Because the contract had been assigned to defendant Fall, "by force of that assignment, he was responsible for this alleged trespass." (*Id.*) Fall denied these allegations. (*Id.*) "Whether Fall was responsible or not, or in what degree, or how, by the mere fact of taking this assignment, depended upon the terms of the instrument and those of the assignment. These are primarily to be shown by the papers themselves." (*Id.*)

"Relying on the witness's perception and memory raises the possibility of erroneous transmission without corresponding justification." (2 Broun, McCormick on Evidence (6th ed. 2006), § 242, p. 116.)

Plaintiffs had the burden of establishing an exception to the hearsay rule. "The proponent of proffered testimony has the burden of establishing its relevance, and if the testimony is comprised of hearsay, the foundational requirements for its admissibility under an exception to the hearsay rule." (*People v. Morrison* (2004) 34 Cal. 4th 698, 724.) Plaintiffs failed to carry this burden.

This is not a scenario in which a Keenan corporate representative could be called to answer for the alleged writing; no one from Keenan can answer in regard to a document that does not exist. Further, as the Court of Appeal noted, Glamuzina cannot stand in as a surrogate for Keenan: "Keenan's corporate representative had no information regarding whether Keenan sold pipes used in McKinleyville, and the Harts did not produce any invoices showing it did. Instead, the Harts were forced to rely on the testimony of Glamuzina, an employee of Christeve. Thus, Glamuzina could not be a party-opponent." (Opinion at 13.)

Plaintiffs' reliance on *YDM Management Co., Inc. v. Sharp Community Medical Group, Inc.* (2017) 16 Cal.App.5th 613 is misplaced and inaccurate. First, in *YDM*, the Court of Appeal found that a declarant's reliance on billing codes pulled from invoices "were not based on inadmissible hearsay." (*Id.* at 630.) The opinion's statements regarding party admission are therefore *dicta*. Second, while *YDM* upheld admission of the declarant's summary of the defendant's invoices with their corresponding billing codes as secondary evidence, there is nothing in the record suggesting that the non-hearsay underlying invoices from which that data was compiled no longer existed. (*Id.* at 630-631, wherein the declarant is said to have searched records from 2012 to 2014 to compile the data.)

The Court of Appeal's Opinion follows existing precedent regarding Section 1220's party admission exception to the hearsay rule. As shown more fully below in Section IV, Plaintiffs lack the requisite ability to show that Keenan actually made any specific statements offered through the testimony of Glamuzina. Rather, Plaintiffs argument begins with an assumption that the invoices are what they *assert* them to be, Keenan documents. In the absence of proof that

Keenan actually made or authorized these alleged statements, Glamuzina's testimony is circular – it serves to create its own hearsay exception through which it would be admissible. Under such circumstances, there can be no finding that the statements were a party admission under Section 1220. (*Pansini, supra,* 53 Cal.App.2d at 5.)

IV. Glamuzina's ambiguous testimony combined with speculation by the Trial Court cannot authenticate "invoices" specifically attributed to Keenan for the purpose of establishing Keenan's liability.

Oral testimony about a writing is permissible only if that writing satisfies the requirements of authentication. (Evid. Code §§ 1401(b) and 1521(c).)

As the Court of Appeal correctly stated, "[w]hen the content of a writing is to be proved by secondary evidence, authentication is required." (Opinion at 14-15; citing Evid. Code § 1521(c).) Authentication of a writing means either, "(a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code § 1400.) As the proponents of the evidence, Plaintiffs bore the burden of

authenticating the invoices identified by Glamuzina. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 525-526.)

California "courts do not assume 'documents are what they purport to be . . .. Generally speaking, documents must be authenticated in some fashion before they are admissible in evidence.' (*Continental Baking, supra,* 68 Cal.2d at 525.)" (Opinion at 15.) "Writings, such as a delivery receipt, must be authenticated before they, or secondary evidence of their contents, may be admitted into evidence." (*Osborne, supra,* 247 Cal.App.4th at 53, citing Evid. Code § 1401.) "Authentication is to be determined by the trial court as a preliminary fact ([Evid. Code] § 403, subd. (a)(3)) and is statutorily defined as 'the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is' or 'the establishment of such facts by any other means provided by law.' ([Evid. Code] § 1400.)" (*Goldsmith, supra,* 59 Cal.4th 256, 266.)

Though methods of authentication are not limited to those enumerated by statute, this does not mean that *any* or *every* conceivable method of authentication is permitted as each case will dictate what is necessary to show authenticity of a writing. (*See Goldsmith, supra,* 59

Cal. 4th at 267.) "The first step is to determine the purpose for which the evidence is being offered. The purpose of the evidence will determine what must be shown for authentication, which may vary from case to case. [Citation.]" (*Id.* at 267.)

The second step in determining what must be shown to authenticate a writing is to evaluate the "specific nature" of the writing sought be introduced. Courts "need to carefully assess the specific nature of the [writing] being offered into evidence *and* the purpose for which it is being offered in determining whether the necessary foundation for admission has been met." (*Goldsmith, supra,* 59 Cal. 4th at 272, fn. 8 [emphasis added].)

A. <u>Purpose</u>: To establish Keenan as the supplier liable for Mr. Hart's exposure to asbestos-cement pipe.

In the instant matter, the purpose for which the disputed writings were offered could not be more heightened. The "invoices" at issue are *the* lynchpin of Plaintiffs' case – the only evidence purportedly linking Keenan to Mr. Hart. The purpose of Glamuzina's deposition testimony was to establish that it was Keenan that supplied asbestos-containing pipe to Mr. Hart's jobsite. As the Court of Appeal correctly noted,

"there was no other evidence establishing Keenan supplied asbestos-cement pipe to the McKinleyville jobsite." (Opinion at 16.)

B. Specific nature of the writing: Nonexistent invoices last seen 40 years ago, purportedly for the sale of asbestos-cement pipe that exposed Plaintiff to asbestos.

In contradiction to this case, Plaintiffs' Brief cites only cases where the writings at issue, or copies thereof, *actually existed*, were presented as evidence at trial, and could be subject to the scrutiny of the trial court and the jury through physical examination. *Those facts do not apply to this case.* The only evidence of the "invoices" – the lynchpin of Plaintiffs' case – is secondary evidence in the form of oral testimony from an 81-year-old witness burdened by all the fallibility of human memory and represented by plaintiff counsel, who provided testimony as to the contents of documents last seen 40 years ago. It is imperative that more is required than a cursory nod towards authentication under these circumstances.

Glamuzina provided no meaningful description of the disputed writings to find that the documents were authentic. In its ruling, the Trial Court did not consider evidence contradicting Glamuzina's recollection regarding the supply of pipe to the McKinleyville project.

Instead, the Trial Court identified three illusory points to support its ruling that the nonexistent invoices were authentic:

> "[1] [T]he witness, as part of his duties, checked the invoice and signed off on it.
>
> [2] His [Glamuzina's] description of the logo ('their K and stuff') is consistent with an exemplar of a Keenan invoice, which has a logo of a large 'K'.
>
> [3] Keenan's records of invoices were apparently destroyed by its successor." (1AA118.)

The Trial Court found "that these facts are sufficient to establish the preliminary fact of authenticity." (1AA118-119.)

1. Glamuzina's testimony is not sufficient authentication when there is no other evidence that the documents existed.

That Glamuzina merely had occasion to see an invoice, delivery ticket, on shipping manifest on the McKinleyville jobsite 40 years ago does not operate to prove that the document was from Keenan. There is no evidence that the driver who allegedly handed Glamuzina the disputed writing was a Keenan employee, or that the delivery truck was a Keenan truck. It is irrelevant that part of Glamuzina's job was to check shipments, or that these alleged writings were seen on a jobsite. This information is not specific to Keenan and has no bearing on whether the invoices were written or authorized by Keenan.

There are certainly cases stating that the location of the documents at issue can be a factor when determining authenticity. (*See, e.g.*, *People v. Gibson* (2001) 90 Cal.App.4th 371, 382-83; *Young v. Sorenson* (1975) 47 Cal.App.3d 911, 915-16.) In every such case, there were significant other items of corroboration in addition to location. And, in every such case, *the writings at issue were available*. None of those circumstances exists here.

In *Gibson*, for example, the Court of Appeal took "judicial notice of and examined the manuscripts" that were seized at the defendant's residence and her hotel room. (*Gibson*, *supra*, 90 Cal.App.4th at 383.) The handwritten manuscripts contained "clear" reference to the defendant. (*Id.* at 382.) The manuscripts were "written in the first person and described operating a prostitution enterprise" as a madam. (*Id.*) The trial court admitted the manuscripts to show the defendant was a madam and the defendant's "state of mind as to whether she was acting as a madam." (*Id.*) The defendant in *Gibson*, however, conceded that she was a madam. (*Id.*)

In *Young v. Sorenson*, "a document purporting to be a reporter's transcript of the Rowe-Young divorce proceedings" was presented to

the court in a separate action regarding balance due on a promissory note. (*Young, supra,* 47 Cal.App.3d at 913.) The writing was located in the office of the attorney for Rowe, who otherwise had no connection to the *Young v. Sorenson* action. (*Id.* at 915-16.) "The transcript copy appeared to be a true report of the divorce proceedings transcribed by the court reporter [as] . . . the transcript copy exactly paralleled the clerk's minutes of the divorce proceedings as shown in the court's original file." (*Id.*) The location of the transcript copy was relevant to show its provenance – a product of the Rowe-Young divorce proceedings that remained in the custody of Rowe's attorney in those proceedings. Here, there is no indicia linking the provenance of the writings described by Glamuzina to Keenan (or that they even ever existed).

2. Glamuzina never testified that the invoices were consistent with an exemplar of a Keenan invoice or logo.

To be clear, Glamuzina never testified that the invoices he recalled were "consistent with an exemplar of a Keenan invoice, which has a logo of a large 'K'," as the Trial Court found. (1 AA 118.) Glamuzina *never* used the term "logo," as asserted by Plaintiffs. (8 RT

2130:9-11 [Plaintiffs' Opening Statement: "And [Glamuzina] told them, he said, I remember the logo. I remember the K, the Keenan K logo . . ."].)

It is not clear what Glamuzina is describing when he mentioned the "K and stuff." While the Trial Court cites the exemplar's "large 'K'," Glamuzina never described the size of the "K," large or otherwise. Plaintiffs' Brief describes Keenan's logo as "a capital 'K' within a circle," while Glamuzina never provided such a description. Plaintiffs' Brief describes the Keenan logo as an illustration of pipe fashioned to resemble a "K," when Glamuzina's testimony was, "their K and stuff," and nothing more.

Having intentionally refused to bring clarity to Glamuzina's deposition testimony at trial, Plaintiffs now ask the Court to adopt their speculation as to what Glamuzina meant. Glamuzina was never shown an exemplar invoice, or any other document from Keenan, and he did not testify that he saw exemplar invoices. Were the "invoices" on Keenan stationery or not? Was there a logo on the invoices as Plaintiffs describe in their Brief? Were the "invoices" actually shipping invoices prepared by the shipping company indicating "Keenan" as the seller?

(*See*, *e.g.*, 1 AA 130-131, and 1 AA 138.) Was the itemization of products Glamuzina read on the "invoices" handwritten or typed? These questions would have been very good ones to put to Glamuzina, who was represented by plaintiff counsel for purely strategic purposes. As explained above, plaintiff counsel would not allow Glamuzina to testify at trial, despite his treating doctor stating that Glamuzina was "absolutely" able to provide testimony via video feed.

At the very least, Glamuzina could have been shown the exemplar invoice to compare against his own recollection. In the end, it was the Trial Court, *not* Glamuzina, who saw an exemplar invoice. It was the Trial Court who made the determination that Glamuzina's truly scant description of the alleged writings and amorphous "their K and stuff" statement was sufficient authentication. The Trial Court's ruling was based on speculation of what Glamuzina may have meant, or may have said if he was shown an exemplar.

3. The Trial Court's finding that Keenan's records were destroyed by its successor is irrelevant to the determination of authenticity.

Whether and how original documents became unavailable is an element for admissibility under the secondary evidence rules, not the

rules of authentication. (*See, e.g.*, Evid. Code §§ 1523(b), 1400, *et seq.*) The Trial Court's ruling regarding the loss of Keenan's records is irrelevant to the authenticity analysis. The fact that Keenan's records were apparently destroyed by its successor is not a factor regarding authentication, as they have no bearing on whether the secondary evidence of those records genuinely represents what the proponents claim them to be.

Ambiguous testimony supplemented by nothing more than speculation are not sufficient grounds for authentication of nonexistent invoices offered as *the* evidence to establish liability against a defendant.

C. The Trial Court disregarded California case law and relevant facts in ruling that Glamuzina's testimony was sufficient evidence of authentication.

While ruling that Glamuzina's own testimony was sufficient to authenticate his oral testimony regarding a writing based on the "K and stuff" description being "consistent with an exemplar," the Trial Court ignored dissimilarities between Glamuzina's testimony and the exemplar. At the initial oral argument on the subject of Glamuzina's testimony regarding the disputed invoices, the Trial Court indicated that

"there's not an authentication or secondary evidence issue. [Glamuzina] didn't testify as to the content of the invoices. He simply said he saw an invoice with Keenan's name on it, so I don't think Evidence Code 1401(b) applies here." (4 RT 923:9-13.) This is inaccurate. First, this ignores Section 1401(a): "The 'writing' referred to in subdivision (a) is *any* writing offered in evidence; although it may be either an original or a copy, it must be authenticated before it may be received in evidence." (Law Revision Com. comment to Evid. Code § 1401 [emphasis].) Second, of course Glamuzina's testimony goes into the content of the writing and well beyond simply seeing Keenan's name or "their K and stuff" on the pieces of paper. The truck driver did not hand Glamuzina a blank piece of paper that said "Keenan" on it. Glamuzina testified that he would review the contents of the invoice to determine what materials were supposed to be on the delivery truck and that the disputed writings identified the plant from which the materials came. (12 RT 3403:23-3404:7; 12 RT 3413:9-14.) It was the contents of the writing that established the supplier of the materials on the truck.

As in *Osborne*, *supra*, 247 Cal.App.4th at 53, there are circumstances that cast the very existence of the invoice into doubt. In

Osborne, the plaintiff did not possess the physical document and no witness other than the plaintiff claimed to have ever seen the receipt. (*Id.*) As in *Osborne*, Plaintiffs do not possess the invoice(s) at issue. As in *Osborne*, there is only one witness as the sole source of evidence regarding a disputed document. (*Id.*)

In *Osborne*, the defendant claimed that no such receipt ever existed. (*Id.*) Keenan also claims that no such documents ever existed. Keenan's corporate representative had "no information whatsoever that Keenan ever sold anything that was used in the McKinleyville work while Mr. Hart was working there." (Opinion at 15.) Keenan has never admitted the authenticity of the document described by Glamuzina, nor has Keenan acted upon the document as if it was authentic. (Evid. Code § 1414(a) and (b).)

According to Glamuzina's testimony, the pipe was ordered and shipped from great distances. Glamuzina testified that his employer would order pipe from Southern California. He described the individual in charge of ordering materials, Mike Mitrovich, as a "funny guy" and Glamuzina "couldn't figure him out" because Mr. Mitrovich would order pipe from Southern California distributors and the pipe

would be shipped in from different places. Plaintiffs argue that Keenan's location approximately 13 miles from McKinleyville is corroborating evidence, but this is pure happenstance. Plaintiffs' theory that the pipe came from Keenan because it had a branch in the region is unsupported by the record and is directly contradicted by Glamuzina.

In addition, the few details recalled by Glamuzina were contradicted by other evidence. Glamuzina testified that the disputed documents identified the plant from which the pipe came, but the exemplar relied so heavily upon by the Trial Court for authentication contains no such information. (*Cf.* 12 RT 3403:23-3404:7 *with* 1 AA 121 and 1 AA 118.)

Plaintiffs contend that Olga Mitrovich, Christeve's bookkeeper in the 1970s, recalled seeing Keenan invoices. (Plaintiffs' Brief at 19-20.) Plaintiffs fail to note that Mitrovich testified that she did not know if Christeve ever ordered asbestos-cement pipe from Keenan and did not know if Keenan was a supplier to the McKinleyville job. (9 RT 2462:5–11.)

Notably, Keenan produced actual, authenticated invoices from Johns-Manville showing that it was Johns-Manville, the pipe manufacturer identified by Glamuzina, that sold pipe directly to Hart's employer, Christeve, and it was Johns-Manville that shipped that pipe directly to Christeve for the McKinleyville project. (7 RT 1828:16–1835:23, 1 AA130-131, 138.) Even if inadmissible for trial purposes, the Johns-Manville documents presented powerful circumstantial information that demonstrated Glamuzina's oral account of the invoices was incorrect and should have factored into the Trial Court's analysis of such circumstantial evidence for purposes of authentication.[7] The Trial Court excluded the Johns-Manville invoices as hearsay but admitted Glamuzina's uncorroborated testimony regarding the content of purported "Keenan" invoices that do not exist.

D. None of the cases cited by Plaintiffs in support of a finding of authentication apply to the facts of this case.

The cases cited by Plaintiffs are all distinguishable:

---

[7]While the trial court acknowledged this theory, "that there was no Keenan intermediary[and it] was directly from JM," during the argument on the motion in limine regarding Glamuzina's testimony, the record is not clear as to whether this exculpatory information, even if inadmissible for trial purposes, factored into the trial court's determination of authenticity regarding Glamuzina's oral testimony regarding Keenan invoices. (7 RT 1807:12-18, 7 RT 1815:18-25.)

- In *People v. Skiles* (2011) 51 Cal. 4th 1178, 1182, 1188, the document at issue was presented at trial and "there was sufficient evidence to sustain a finding that the faxed document was an accurate copy of an authentic court record from the Circuit Court of Lauderdale County, Alabama" and could be compared with a document of "unquestioned authenticity."
- In *People v. Gibson* (2001) 90 Cal.App.4th 371, 383, manuscripts presented at trial were seized at the defendant's residence and her hotel room. The contents could be examined with sufficient detail to determine that the manuscripts contained a reference to one of defendant's aliases and showed that defendant was operating as a madam.
- *Young v. Sorenson* (1975) 47 Cal.App.3d 911, 915–16, the court found that the matters set forth in a copy of a court reporter's transcript presented at trial "exactly paralleled" the court clerk's minutes of the divorce proceedings at issue as shown in the court's original file. Further, a transcript copy, apparently prepared for a use related to the divorce

proceedings, had been in the possession of Rowe's attorney in the divorce litigation who had no connection with the present action.

- In *People ex Rel. Harris v. Sarpas* (2014) 225 Cal.App.4th 1539, 1570, the trial court received in evidence an exhibit consisting of the front and back sides of over 1,900 checks from over 1,200 bank customers. "The Attorney General authenticated the checks with testimony from a representative of Bank of America about how the checks were processed and the bank's custom and practice in accepting and negotiating the checks. The trial court accepted this testimony as sufficient to authenticate the checks for the *purpose* for which they were received in evidence." (Emphasis added.)

Valid means of authentication of a writing include content, location, and circumstantial evidence. (*People v. Smith* (2009) 179 Cal.App.4th 986, 1001.) Here, however, the content, location, and circumstantial evidence relied upon by the Trial Court and Plaintiffs are demonstratively invalid:

- Glamuzina's description of the purported invoice does not correlate with the exemplar in any meaningful sense and is, in fact, contradicted as the exemplar does not mention the plant of origin.
- Glamuzina testified that the pipe delivered by Keenan came from great distances, but it is Plaintiffs' theory that Keenan was the supplier because it had a branch in the region.
- The document at issue itself does not exist (it never has) and is therefore incapable of scrutiny.
- There are authenticated documents demonstrating the actual supplier of the product at issue—that is, *not* Keenan.

The purpose for which Glamuzina's testimony was sought to be introduced could not be higher. Plaintiffs' entire case hinged on this testimony. The nature of the writing to be introduced – oral evidence of a writing 40 years removed from the events at issue – was too susceptible to fallible memory. Given the circumstances of this case, the Trial Court's reliance on extremely selective indicia of authentication was an abuse of discretion. More was required under California law.

V. Finding that Glamuzina's circular testimony authenticates nonexistent documents will allow the admission of third-party hearsay testimony as a party admission in future cases without limitation.

Generally, oral testimony is not admissible to prove the content of a writing. (Evid. Code § 1520(a).) "[S]econdary evidence must 'meet the threshold requirement of being trustworthy.'" (*Prato-Morrison v. Doe* (2002) 103 Cal. App. 4th 222, 230.)

As the Court of Appeal correctly stated, "secondary evidence must be 'otherwise admissible.'" (Opinion at 14-15; citing Evid. Code § 1521(a).) But, as noted above, Glamuzina's testimony regarding the Keenan invoices is not "otherwise admissible." The Court of Appeal correctly found the testimony to be hearsay without exception and lacking authenticity.

Plaintiffs argue that the "party admission" hearsay exception applies so that Glamuzina's testimony is not hearsay, but "otherwise admissible" secondary evidence. This argument conflates the rules of evidence by using Section 1523(b) as a proxy to characterize nonexistent invoices as authentic. However, the analysis of hearsay, authenticity, and secondary evidence must remain distinct. If the opposite was true, the statutory rules for authenticity would be

meaningless; any nonexistent document purportedly authored by a party would become a self-authenticating party admission.

As this Court has long recognized, "human memory is so fallible that witnesses, after a long lapse of time, are liable to forget the real facts." (*Healy v. Buchanan* (1868) 34 Cal. 567, 570.) By their nature, asbestos-related matters such as this involve events that happened very long ago. This is coupled with a statute of limitations that is not tied to the manifestation of injury, but to "disability" in the form of lost time from work. (Code Civ. Proc. § 340.2.) In operation, a retired plaintiff, as is often the case in asbestos-related matters, will never face a statute of limitations bar because they will never be "disabled." "Statutes of limitation are designed to prevent the resurgence of stale claims after the lapse of long periods of time as a result of which loss of papers, disappearance of witnesses, feeble recollections, make ineffectual or extremely difficult a fair presentation of the case." (*Los Angeles Cty. v. Sec. First Nat. Bank of Los Angeles* (1948) 84 Cal. App. 2d 575, 580.)

In light of the more forgiving statute of limitations period set forth in Section 340.2, the Evidence Code cannot be applied with such liberality with respect to the authenticity of documents and the rules

relating to secondary evidence, including Evidence Code section 1521(a). Where events happened so long ago, evidence to corroborate or refute a claim becomes even more difficult and time consuming to unearth, if not impossible.

These issues become exponentially magnified in a preference case such as this when the time to conduct discovery and prepare for trial is so severely truncated. These issues are then multiplied again when a trial result based on abbreviated discovery in the personal injury action is saddled upon a defendant due to res judicata in the inevitable wrongful death case.

CONCLUSION

The Court of Appeal's decision is consistent with the precedent set before it in *Pacific Gas, Osborne*, *Goldsmith,* and *Continental Baking*. Plaintiffs complain that the Opinion left open the question of whether testimony regarding the name on product packaging will now be excluded as hearsay. However, the Opinion explicitly leaves untouched the issue identified by Plaintiffs: "Here, we are not called upon to determine the proper basis for admitting testimony regarding a

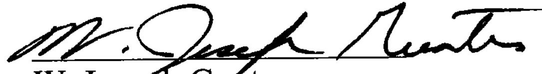
witness's observation of a company's name or logo on a product." (Opinion at 10.) Nothing has changed.

Given the nature of the disputed writings and the purpose to which they were put at trial, more was required to authenticate these writings. There is no basis for authenticating the purported documents, the only evidence of which is the hearsay testimony of a witness based on the contents of the documents that only he saw. Exculpatory, authenticated Johns-Manville documents were excluded from trial and not considered when considering the authenticity of the disputed writings. The Trial Court's errors on each issue presented on appeal substantially prejudiced Keenan's defense. Improper hearsay evidence based on the content of unauthenticated documents was admitted to prove liability against Keenan. At the same time, as the Court of Appeal correctly found, the Trial Court abused its discretion in ruling on these issues.

To ensure fairness, due process requires there be a balance between the Evidence Code and events that, by the nature of the litigation, happened a long time ago. Respectfully, Keenan urges this Court to uphold the appellate court's Opinion.

Dated: July 25, 2019

CMBG3 Law LLC

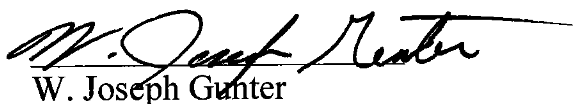


W. Joseph Gunter
Gilliam F. Stewart
Attorneys for Respondent and Defendant
KEENAN PROPERTIES, INC.

CERTIFICATE OF WORD COUNT

I hereby certify that this brief consists of 12,809 words in Times New Roman 14-point font (13-point for footnotes) as counted by the Word for Microsoft Office 365 ProPlus program used to generate the text of this brief.

Dated: July 25, 2019



W. Joseph Gunter

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 505 Montgomery, Suite 1042, San Francisco, CA 94111.

On July 25, 2019, I served true copies of the following document(s) described as:

RESPONDENT'S ANSWER BRIEF ON THE MERITS

on the interested parties in this action as follows:

David Amell, Esq.
Marissa Uchimura, Esq.
Maune Raichle Hartley French & Mudd
70 Washington Street, Suite 200
Oakland, California 94607
Tel: (800) 358-5922
Fax: (314) 241-4838

Denyse F. Clancy, Esq.
Ted W. Pelletier, Esq.
Kazan, McClain, Satterley & Greenwood
Jack London Market
55 Harrison Street, Suite 400
Oakland, California 94607
Tel: (510) 302-1000
Fax: (510) 835-4913

California Court of Appeal
First District, Division Five
350 McAllister Street
San Francisco, CA 94102-7421

BY ELECTRONIC SERVICE: I electronically served the document(s) described above via TrueFiling, on the recipients designated on the Transaction Receipt located on the California Supreme Court website pursuant to the Court Order establishing the case website and authorizing service of documents.

In addition, I served said document(s) on the persons or entities

The Honorable Brad Seligman
Superior Court County of Alameda
Department 23

1221 Oak Street
Oakland, CA94612

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the above addresses and placed the envelope for collection and mailing with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 25, 2019, at San Francisco, California.

W. Joseph Gunter